94-123

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

In re:

CHANNEL 41, INC.,	)
Battle Creek, Michigan,	)
Petition for Rule Making	)
regarding "Off-Network"	)
provision of Section 73.658(k)	)
of the Commission's Rules	)

To: The Commission

JOINT COMMENTS IN RESPONSE TO
APPLICATION FOR REVIEW

Comes now **A.H. BELO CORPORATION, COX ENTERPRISES, INC., GAYLORD BROADCASTING COMPANY, JEFFERSON-PILOT COMMUNICATIONS CO., KING BROADCASTING COMPANY, MEDIA GENERAL INC., MEREDITH CORPORATION, MIDWEST COMMUNICATIONS INC., OUTLET COMMUNICATIONS,INC., PULITZER BROADCASTING COMPANY, TRIBUNE BROADCASTING COMPANY, WESTINGHOUSE BROADCASTING COMPANY, INC., ABC TELEVISION AFFILIATES ASSOCIATION, ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.** and **NAPTE INTERNATIONAL** (hereinafter "joint parties"), by their attorneys and submit the following comments in response to the above application for review. Channel 41 seeks Commission review of the Mass Media Bureau's dismissal 1/ of

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1/ Channel 41's Petition was dismissed pursuant to Section 1.401(e) of the Commission's rules which provides
(continued...)

its Petition of Rulemaking which in turn had sought the institution of proceedings to repeal the "off-network" provision of the Prime Time Access Rule ("PTAR"). 2/

Statement of Interest and Summary Position

The joint parties include licensees of both affiliated and independent television stations in various size markets, as well as associations comprising the program directors of the nation's television stations, the independent station industry, and the affiliates of the ABC network. While there may be a short term advantage to some of the joint parties through such a change in PTAR, they share a common view that this rule should not be subjected to disruption in any way at this time. The local television station industry benefits from the rule. More importantly, the highly competitive and diverse marketplace for television programming which has developed under PTAR has been of benefit to the public. As the Commission has recognized in the past, a lengthy and no doubt litigious rulemaking proceeding would unnecessarily have a chilling effect on a

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1/(...continued)
that "[p]etitions which are moot, premature, repetitive, frivolous, or which plainly do not warrant consideration by the Commission may be denied or dismissed without prejudice to the petitioner." 47 C.F.R. Section 1.401(e).

2/ PTAR prohibits network affiliated television stations in the top 50 markets from running more than 3 hours of either network or "off-network" programming during the 4 hours of prime time, Monday through Saturday. 47 C.F.R. Section 73.658(k).

healthy and active programming marketplace to the detriment of all interested parties and the public.

The Petition for Rulemaking, filed on April 24, 1987 by Channel 41, suggested that increases in the number of first run syndicated programs and the growth of independent television stations mandated the repeal of the "off-network" provision at this time. While we do not dispute the facts alleged, it simply does not necessarily follow that the "off-network" provision should be repealed for these reasons. Nor was any other valid reason presented to begin to institute rulemaking proceedings at this time.

The Petition was dismissed by the Chief, Mass Media Bureau, pursuant to Section 1.401(e) of the Commissions rules providing for such treatment where the matter, inter alia, plainly does not warrant consideration by the Commission. As stated by then Bureau Chief McKinney, "reexamination of the prime time access rule, or its constituent parts," is not "warranted at this time" as the relief sought by Channel 41 "would, in effect, deprive the rule of most of its effect."

Channel 41 now seeks full Commission review of that dismissal. The sole issue now before the Commission is whether the Mass Media Bureau erred in its summary disposition of the petition pursuant to the provisions of Section 1.401(e). We submit that the action of the Bureau was correct and well within its discretion. Indeed, the Commission adopted Section 1.401(e) in 1980 to deal with this type of situation in order to avoid wasting its

resources (as well as those of interested parties) in calling for comments on matters which do not merit attention. Channel 41 has not shown (as required by Section 1.115 of the Commission's rules to merit review by the Commission) that the Bureau's application of Section 1.401(e) was in conflict with case precedent or policy or otherwise reviewable under Section 1.115.

I. The Commission has Broad Discretion in the Disposition of Petitions for Rulemaking.

The Administrative Procedure Act ("APA") accords agencies broad discretion in their disposition of petitions for rulemaking. While the APA does require an agency to "give an interested person the right to petition for the issuance, amendment, or repeal of a rule," 3/ the legislative history of the APA makes clear that "[t]he mere filing of a petition does not require an agency to grant it, or to hold a hearing, or engage in any other public rule making proceedings." 4/

Indeed, while the Commission's own rules set forth notice and comment procedures applicable to petitions for rulemaking, 5/ these rules were amended in 1980 to deal with

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3/ 5 U.S.C. Section 553(e)

4/ S. Rep. No. 752, 79th Cong., 1st Sess. (1945) (emphasis added). For a further discussion of this legislative history, see WWHT, Inc. v. FCC, 656 F.2d 807, 813-14 (D.C. Cir. 1981). See also Amendments to Part 0, and Part 1, 79 FCC 2d 1, 2 n.4 (1980).

5/ 47 C.F.R. Sections 1.403, 1.405.

precisely the type of situation presented by Channel 41's petition. As stated by the Commission, where

> a petition is moot, repetitive, premature, frivolous, or does not warrant consideration by the Commission, it may be denied or dismissed, without prejudice, and neither Public Notice nor the opportunity for comments and replies need be given.

Amendments to Part 0, and Part 1, 79 FCC 2d 1 (1980). This action adopting Section 1.401(e) was intended to eliminate a "needlessly burdensome step which imposes unwarranted demands of time and expense on both private parties and Commission staff" in those circumstances where the petition "will almost certainly be dismissed or denied." Id. at 2. Otherwise, the Commission could be required to divert its time and resources to unproductive matters and go through needless motions based on the mere filing of a petition alone.

Once a rule is established, the law does not compel an agency to repeat lengthy and time consuming rulemaking proceedings merely on the basis of broad allegations of changed circumstances. If that were the case, the FCC could be inundated with petitions regarding virtually every rule that it has ever promulgated.

This broad discretion to dispose of petitions for rulemaking has been repeatedly affirmed by the courts. For example, in ACT v. FCC, 564 F.2d 458 (D.C. Cir. 1977), the Court held that

> as a corollary of [its] broad general discretion, the Commission has considerable latitude in responding to requests to institute proceedings or to promulgate rules, even though it possesses the authority to do

> so should it see fit. "Administrative rule making does not ordinarily comprehend any rights in private parties to compel an agency to institute such proceedings or promulgate rules." Rhode Island Television Corp. v. FCC, 320 F.2d 762, 766 (D.C. Cir. 1963).

564 F.2d at 479. 6/

Courts have vacated denials of rulemaking petitions only in "the rarest and most compelling of circumstances," 7/ such as where the agency erred in construing its statutory authority or misconstrued an express statutory directive. E.g., Geller v. FCC, 610 F.2d 973 (D.C. Cir. 1979); NAACP v. FPC, 520 F.2d 432 (D.C. Cir. 1975), aff'd, 425 U.S. 662 (1976); National Organization for the Reform of Marijuana Laws (NORML) v. Ingersoll, 497 F.2d 654 (D.C. Cir. 1974); ITT World Communications, Inc. v. FCC, 699 F.2d 1219 (D.C. Cir. 1983), rev'd on other grounds, 466 U.S. 463 (1984). As the Court of Appeals explained in ITT, these rare cases do not deal with matters, such as Channel 41's Petition, where the "proposal is addressed to matters within the agency's broad policy discretion" and expertise. 699 F.2d at 1246.

6/ See also WWHT, Inc. v. FCC, 656 F.2d 807, 809 (D.C. Cir. 1981) ("the decision to institute rulemaking is one that is largely committed to the discretion of the agency, and that the scope of review of such a determination must, of necessity, be very narrow."); Professional Drivers Council v. Bureau of Motor Carrier Safety, 706 F.2d 1216, 1223 (D.C. Cir. 1983); Arkansas Power & Light Co. v. ICC, 725 F.2d 716, 723 (D.C. Cir. 1984).

7/ WWHT, supra, at 818.

II. The Bureau Properly Exercised its Discretion in Dismissing the Channel 41 Petition.

The proceedings leading to the ultimate adoption of PTAR in its final form were an extensive effort spanning more than a decade and included oral arguments before the Commission en banc, amendments, reconsiderations, judicial review and remands.[8/] Since final resolution in 1976, the Commission has sought to steer a careful path and not upset the balance which had been struck. As expressed in the Commission's most recent pronouncement denying a request for declaratory ruling or waiver of the "off-network" provision, the Commission has a "... strong interest in preserving the PTAR as a means of enhancing diversity in the television marketplace." Rhodes Productions, Inc., 58 RR 2d 126, 129 (1985). The Bureau's action is in full accord with this history and the broad discretion accorded administrative agencies in such matters.

Channel 41's Petition did little more than raise largely immaterial claims that the off-network provision of PTAR is no longer necessary. [9/] Specifically, Channel 41

8/Television Network Programming, 4 RR 2d 1589 (1965); Network Television Broadcasting, 23 FCC 2d 382 (1970), recon. denied, 25 FCC 2d 318 (1970), aff'd sub nom., Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971); Prime Time Access Rule, 44 FCC 2d 1081 (1974), effective date enjoined, N.A.I.T.P.D. v. FCC, 502 F.2d 249 (2d Cir. 1974); Prime Time Access Rule, 50 FCC 2d 829 (1975), remanded in part, N.A.I.T.P.D. v. FCC, 516 F.2d 526 (2d Cir. 1975).

9/ Incredibly, Channel 41 also argues that network dominance is no longer a concern as the networks control

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claimed that there has been substantial growth in the amount of available first-run syndicated programming and an improvement in the status of independent television stations. However, that same evidence could be used just as easily to argue that the rule is working and should not be altered in any way. Given PTAR's lengthy history and Channel 41's failure to make a case, the Bureau properly disposed of Channel 41's petition, pursuant to the provisions of Section 1.401(e), in the exact manner intended by the Commission in promulgating that section.

Channel 41 also suggests the Commission is required to issue a notice of proposed rulemaking to address the constitutionality of the off-network provision of PTAR. However, the constitutionality of PTAR, including the off-network provision, was exhaustively considered and upheld in Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971), and again in N.A.I.T.P.D. v. FCC, 516 F.2d 526 (2d Cir. 1975). 10/ Channel 41 has presented no reason to revisit these judicial determinations. As the constitutionality of PTAR has been litigated, the Commission need not re-examine the constitutional issues raised by

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9/(...continued)
"only 75 percent" of the prime time audience. Petition, at 18. While network dominance has decreased somewhat, a 75 percent share still represents an overwhelming position in any market.

10/ The Commission itself also considered and rejected constitutional arguments against the rules. See Prime Time Access Rule (PTAR III), 50 FCC 2d 829, 846-48 (1975).

Channel 41, other than to note that PTAR has been upheld by the courts.

Finally, Channel 41's request must be viewed in the context of its unique position in the unusual Grand Rapids-Battle Creek-Kalamazoo market. Channel 41, a high channel UHF ABC affiliate, competes against three VHF affiliates and one independent UHF. The competition includes an established ABC affiliate in Grand Rapids, which is by far the largest city in the market. As a result of inherent UHF signal propagation problems, Channel 41 is effectively limited to the Battle Creek-Kalamazoo submarket, which, by itself, would not be in the top 50 markets. Due to these unique circumstances, Channel 41 has sought a waiver of the off-network rule on four prior occasions. 11/ Even though its current request is in the form of a petition for rulemaking, it bears a strong resemblance to its prior waiver requests. Rules of general application such as PTAR, however, should not be tampered with merely because of rather unique circumstances that do not reflect a general condition.

CONCLUSION

For these reasons, Channel 41's Application for Review must be denied. The petition was appropriately dismissed by delegated staff authority. A rulemaking proceeding at this time would be a waste of the Commission's limited resources and would serve no public interest purpose.

11/ See Requests for waivers at 37 FCC 2d 670 (1972); 68 FCC 2d 1192 (1978); 71 FCC 2d 606 (1979); and 48 RR 2d 1239 (1981).

Rather, it could only serve to disrupt the programming marketplace which, in turn, would decrease the diversity of programming available to the public to the detriment of all interested parties.

Respectfully submitted,

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July 21, 1987

CERTIFICATE OF SERVICE

I, Jane Nauman, hereby certify that the foregoing "Joint Comments in Response to Application for Review" was served this 21st day of 1987, by hand, to the following individual at the address listed below:

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